Cheng Seng Hup & Ors v Wangsa Tegap Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-22NCVC-59 OF 2011
ZABARIAH MOHD J
18 JANUARY 2012

Contract — Frustration — Change in circumstances — Contract to develop service suites commercially impossible to perform — Only 3% of suites sold 2 1/2 years after project's launch — Whether poor demand unforeseen supervening event beyond defendant developer's control — Commercially disastrous for defendant to proceed with project — Whether sale and purchase agreement (SPA) provided for such event — Whether SPA frustrated — Whether defendant's rescission of SPA lawful — Whether unjust to developer and purchaser if SPA enforced

The plaintiffs, who were husband and wife and Singapore citizens, entered into a sale and purchase agreement ('SPA') with the defendant developer to purchase a service suite for RM446,500. The suite was among 1,658 such units the defendant intended to develop within a two-tower block with 39 floors ('the project'). Upon execution of the SPA, the plaintiffs paid a deposit of RM44,650 ('the deposit'). The defendant contended that despite aggressive marketing of the project both locally and abroad, only 49 units of the service suites were sold two and a half years after the launch of the project, making it commercially impossible for the defendant to proceed with the venture. The defendant cancelled the project and negotiated with the 49 purchasers to rescind the respective SPAs. The defendant offered the plaintiffs a refund of the deposit plus an additional equivalent sum as compensation. If the offer was rejected, the defendant said it would only refund the deposit. The plaintiffs asked for RM150,000 in compensation apart from the refund of the deposit and other incidental costs. The defendant rejected the proposal and refunded the deposit to the plaintiffs via cashier's order which the latter accepted and presented for payment without reservations. Thereafter, the plaintiffs' solicitor informed the defendant they were holding the refunded deposit as stakeholders and that the plaintiffs were terminating the SPA and wanted RM463,000 in damages. The plaintiffs filed the instant action for, inter alia, (i) a declaration that the defendant had breached the SPA by unilaterally terminating it and that the SPA had consequently been terminated; (ii) RM463,000 in general damages; (iii) RM10,792.32 in legal costs; and (iv) exemplary damages.

Held, dismissing the claim with costs:

(1) The defendant had established that the SPA was rescinded due to poor sales, which was an unforeseen and supervening event not provided for in the contract (see para 15).

(2) Despite aggressive marketing locally and internationally, there were poor sales. This was beyond the defendant's control. The SPA had become commercially impossible to perform due to the change in circumstances. The SPA prima facie was dissolved by frustration and was lawfully rescinded by the defendant (see paras 47, 49, 51 & 79(c)).

(3) It would have been unjust to the defendant and also to the plaintiffs if the SPA was enforced. For the defendant, it would have been a commercial disaster and for the purchasers, a bad investment (see para 55).

(4) The plaintiffs failed to prove the loss they allegedly suffered. Their special damage claim for liquidated and ascertained damages ('LAD') was not pleaded and that was fatal. In any event, LAD was relevant only when the SPA was subsisting. Since the SPA had been terminated by the defendant, the plaintiffs were only entitled to claim damages and not LAD (see paras 69–70).

(5) The plaintiffs failed to substantiate their general damages claim for RM463,000. Since the contract was frustrated, the claim for legal fees could not be entertained (see paras 71 & 76).

[Bahasa Malaysia summary

Plaintif-plaintif, suami isteri warganegara Singapura, telah memeterai perjanjian jual beli ('PJB') dengan pemaju defendan untuk membeli sebuah suite servis dengan harga RM446, 500. *Suite* adalah antara 1,658 unit yang defendan bertujuan untuk membangunkan dalamnya blok dua menara 39 tingkat ('projek'). Ketika pelaksanaan PJB, plaintif telah membayar deposit sebanyak RM44,650 ('deposit'). Defendan berhujah bahawa walaupun pemasaran projek adalah agresif, dalam dan luar negara, hanya 49 unit *suite* servis telah dijual dua setengah tahun selepas pelancaran projek, menjadikannya mustahil dari segi komersial bagi defendan untuk meneruskan usaha. Defendan membatalkan projek dan berunding dengan 49 pembeli untuk membatalkan PJB masing-masing. Defendan menawarkan plaintif-plaintif bayaran balik deposit ditambah dengan sejumlah wang tambahan yang setimpal sebagai pampasan. Jika tawaran tersebut ditolak, defendan mengatakan bahawa ia hanya akan membayar balik deposit. Plaintif-plaintif meminta RM150,000 sebagai pampasan selain daripada bayaran balik deposit dan kos-kos sampingan yang lain. Defendan menolak cadangan tersebut dan memulangkan deposit kepada plaintif-plaintif secara kiriman wang yang mana plaintif-plaintif terima dan kemukakan bayaran tanpa tempahan. Selepas itu, peguamcara plaintif-plaintif memaklumkan kepada defendan bahawa mereka memegang deposit yang dikembalikan sebagai pihak yang berkepentingan dan bahawa plaintif telah menamatkan PJB dan menuntut RM463,000 sebagai ganti rugi. Plaintif-plaintif memfailkan tindakan ini bagi, antara lain, (i) suatu deklarasi bahawa defendan telah melanggar PJB dengan secara unilateral menamatkannya dan akibatnya PJB

telah ditamatkan; (ii) RM463,000 sebagai ganti rugi am; (iii) RM10,792,32 sebagai kos undang-undang; dan (iv) ganti rugi teladan.

Diputuskan, menolak tuntutan dengan kos:

(1) Defendan telah membuktikan bahawa PJB dimansuhkan kerana jualan yang tidak memberangsangkan, yang merupakan suatu kejadian yang tidak diduga dan tidak dijangka yang tidak diperuntukkan di dalam kontrak (lihat perenggan 15).

(2) Walaupun terdapat pemasaran yang agresif di dalam dan luar negara, tetapi jualan yang tidak memberangsangkan. Ini adalah di luar kawalan defendan. PJB telah menjadi mustahil dari segi komersial untuk dilaksanakan akibat perubahan hal keadaan. PJB telah dibubarkan prima facie atas kekecewaan dan telah sah dibatalkan oleh defendan (lihat perenggan 47, 49, 51 & 79(c)).

(3) Adalah tidak adil bagi defendan dan juga plaintif jika PJB tersebut dikuatkuasakan. Bagi defendan, ia akan menjadi bencana komersial dan bagi pembeli-pembeli, suatu pelaburan yang rugi (lihat perenggan 55).

(4) Plaintif-plaintif gagal membuktikan kerugian yang kononnya mereka alami. Tuntutan kerosakan khas mereka untuk ganti rugi yang ditetapkan dan ditentukan tidak diplidkan dan itu mampu menjejaskan. Dalam sebarang keadaan, ganti rugi yang ditetapkan dan ditentukan tersebut adalah relevan hanya apabila PJB telah wujud. Oleh kerana PJB telah ditamatkan oleh defendan, plaintif hanya berhak untuk menuntut ganti rugi dan tidak ganti rugi yang ditetapkan dan ditentukan (lihat perenggan 69–70).

(5) Plaintif-plaintif gagal untuk menyokong tuntutan ganti rugi am sebanyak RM463,000. Oleh kerana kontrak tersebut dikecewakan, tuntutan untuk yuran guaman tidak boleh dilayan (lihat perenggan 71–76).]

Notes

For cases on change in circumstances, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4487–4489.

Cases referred to

Goh Yew Chew & Anor v Soh Kian Tee [1970] 1 MLJ 138, FC (refd)

Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd [2007] 4 MLJ 201, CA (refd)

Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chin & Anor [2009] 6 MLJ 293, FC (folld)

Praed v Graham (1890) 24 QBD 53, CA (refd)

Prehn and another v The Royal Bank of Liverpool (1869) LR 5 Exch 92 (refd)

Rookes v Barnard and others [1964] AC 1129, HL (refd)

Legislation referred to

Civil Law Act 1956 s 15(2)
Contracts Act 1950 s 57, 57(2)

Kunasegaran (Norfadilah with him) (Lau, Wong & Partners) for the first and second plaintiffs.
B Thangaraj (Thangaraj & Associates) for the defendant.

Zabariah Mohd J:

BACKGROUND

[1] The first and the second plaintiffs are husband and wife and are Singapore citizens.

[2] The third plaintiff is a nominal plaintiff who does not have any claim against the defendant.

[3] The defendant is a developer of a project known as Berjaya Central Park Suites ('the project').

[4] The project involves development of two towers with 39 floors and 1658 Suites on the land situated in Kuala Lumpur.

[5] By a sale and purchase agreement dated 13 September 2005 ('the SPA'), the first plaintiff and the second plaintiff have agreed to purchase a service suite known as parcel No 2, Level No 19, Type B3, Service Suite Tower 28, Berjaya central Park ('the property') measuring 463 square ft at the purchase price of RM446,500 ('the purchase price').

[6] Upon execution of the SPA, the first plaintiff and the second plaintiff paid the deposit sum of 10% of the purchase price which is RM44,650 ('the deposit').

[7] The first plaintiff and the second plaintiff had secured a loan from the third plaintiff to finance the balance purchase price of the property. The facility agreement dated 11 May 2006 is in bundle B at p 44–48. The first and the second plaintiffs have also signed the deed of assignment dated 11 May 2006 to surrender their rights under the SPA to the third plaintiff.

[8] The defendant contends that the project was launched on 23 November

2004. Despite the aggressive campaign undertaken by the defendant to promote the project locally and overseas, the response from buyers was far from encouraging.

[9] It was contended by the defendant that only 2.95% or 49 units of the service suites were sold after two and half years of launching. In the light of these circumstances, the defendant was of the view that it would be practically impossible for the defendant to proceed with the project.

[10] After two and half years the defendant decided to cancel the project.

[11] The defendant started to negotiate with the 49 purchasers to rescind the respective SPAs.

[12] As far as the first and the second plaintiff are concerned, there was also negotiation by the defendant with them. The first and the second plaintiffs were specifically informed that due to the circumstances it was impossible for the defendant to proceed with the project.

[13] The first and the second plaintiffs did not revert to the defendant despite the letters written to the first and the second plaintiffs. Hence vide letter dated 18 November 2008 the defendant gave a final notice to the first and the second plaintiffs to accept the rescission of the SPA and the refund of the deposit plus an ex gratia additional sum of 100% of the amount paid, failing which the defendant would refund the sum of RM44,650 as the SPA has become impossible to perform.

[14] By a letter dated 26 November 2008, the first and the second plaintiffs' solicitor had informed the defendant that their client's real estate agent had allegedly informed them that the current prices of the condominiums/service suites around the locality had appreciated and requested the defendant to pay RM194,650 being a refund of 10% of the purchase price and compensation sum of RM150,000 apart from incidental costs of RM10,792.32.

[15] The defendant was not agreeable to the proposal made by the first and the second plaintiffs and had accordingly informed the first and the second plaintiffs solicitor by letter dated 1 December 2008 that the SPA had been rescinded due to supervening and unforeseen events and informed the solicitor that the actual 10% deposit (RM44,650) which was paid by the first and the second plaintiffs would be refunded directly to the first and the second plaintiffs.

[16] By a letter dated 1 December 2008, from the defendant to the first and

the second plaintiff, the defendant had forwarded Demand Draft No SCB 947104 for the sum of SCD18,577.08 (equivalent to RM44,650).

[17] By email dated 22 December 2008 from the first plaintiff to DW2, the first plaintiff had requested the defendant to reissue the demand draft for SGD 18,577.08 as the Demand Draft No SCB 947104 was misplaced by them.

[18] Accordingly a new Cashiers Order No SCB 947776 for the sum of SGD 18,577.08 (equivalent to RM44,650) was prepared by the defendant under the name of the first plaintiff and the second plaintiff and sent to their solicitor by letter dated 12 January 2009.

[19] The first and second plaintiff accepted the payment of the sum of RM44,650 and the Cashiers Order No SCB 947776 was duly presented for payment.

[20] The first and the second plaintiffs' solicitor had by a letter dated 19 March 2009, have informed the defendant the sum of RM44,650 is being held by the first and second plaintiffs solicitor as stakeholders. The first plaintiff and the second plaintiff are now terminating the SPA and seeking damages for the sum of RM463,000.

[21] The defendant's solicitor, by a letter dated 24 April 2009 informed the first and the second plaintiffs solicitor that:

(a) the SPA had already being terminated by the defendant due to supervening and unforeseen circumstances;

(b) in respect of the first plaintiff and the second plaintiff's claim for damages, the defendant had requested for a copy of the report prepared by the first and second plaintiffs' real estate agent; and

(c) the defendant did not agree that the sum of RM44,650 is to be held by the first and the second plaintiffs' solicitor as stakeholder as the sum of RM44,650 was paid by the defendant as full and final settlement and the first plaintiff and the second plaintiff had accepted the sum without any reservation.

[22] There was no reply by the first and the second plaintiffs' solicitor to the defendant's solicitor letter dated 24 April 2009.

[23] Hence the present suit was filed by the first and the second plaintiffs in January 2011 seeking for the following reliefs:

(a) a declaration that the defendant had breached the SPA dated 13 September 2005;

(b) a declaration that the SPA dated 13 September 2005 had been terminated due to the breach by the defendant;

(c) that the defendant is to refund to the first and the second plaintiffs the purchase price which was paid by the first and the second plaintiffs to the defendant in the amount of RM44,650;

(d) that the defendant is to pay the legal fees amounting to RM10,792.32;

(e) that the defendant pay general damages in the amount of RM463,000 or as assessed by the SAR;

(f) that the defendant to pay exemplary damages;

(g) interest on the judgment sum; and

(h) costs.

THE ALLEGATIONS BY THE FIRST AND SECOND PLAINTIFFS IN THE STATEMENT OF CLAIM

[24] Paragraph 23 of the statement of claim alleged that the defendant had breached the agreement when the defendant had unilaterally terminated the agreement as there is no provision in the agreement for the defendant to rescind the agreement.

[25] As a result of the breach the first and the second plaintiffs have incurred loss and damages as the land which is located in the vicinity had increased in value ie twice the original value.

[26] The case went for full trial. The plaintiffs called one witness, PW1 who is the first plaintiff.

[27] The defendant called two witnesses ie:

(a) DW1: a registered valuer and estate agent; and

(b) DW2: the general manager of the defendant company.

ISSUES TO BE TRIED

(a) Whether there is breach by the defendant of the SPA dated 13 September 2005;

(b) whether the defendant is entitled to terminate the SPA dated 13 September 2005 due to the supervening and unforeseen circumstances which caused the contract to be frustrated;

(c) whether the receipt of the Cashier Order No 947776 by the first and

second plaintiffs without reservation amounts to a full and final settlement of any claim by the first and the second plaintiffs against the defendant; and

(d) whether the first and the second plaintiffs incurred losses as a result of the alleged termination of the SPA dated 13 September 2005.

THE COURTS FINDINGS

[28] In the course of the trial, the first and the second plaintiffs raised the following as part of their defence:

(a) the notice of termination dated 18 November 2008 was allegedly issued only when the project was due for completion. Therefore the plaintiffs alleged that there is mala fide on the part of the defendant when it rescind the agreement;

(b) the defendant did not commence any work at all at the site; and

(c) there was no market viability exercise done by the defendant before launching the project and the failure of the project was due to the failure of the defendant to carry out the same before venturing into the project.

[29] The defendant submits that these issues are not pleaded, hence it should not be considered by this court.

[30] I agree with the submission by the defendant on this point. It is trite law that parties are bound by its own pleadings and any diversion should be prohibited. Therefore the plaintiffs are not allowed to ventilate on the same.

[31] The central issue that arises from the pleadings in this case is whether the defendant is entitled to rescind the agreement due to the events that have occurred which according to the defendant has made it impossible for the defendant to carry on with the project.

[32] The defendant submits that the agreement had been frustrated due to some supervening event. This point will determine the first and second issue raised in the case herein.

[33] The doctrine of frustration is provided in s 57 of the Contracts Act 1950 which states:

(1) An agreement to do an act impossible in itself is void.

(2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful;

(3) Where one person has promised to do something which he knew, or with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, the promisor must make compensation to the promise for any loss which the promise sustains through the non-performance of the promise.

[34] The Court of Appeal in the case of *Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd* [2007] 4 MLJ 201 sets out the three elements that must be fulfilled before the doctrine of frustration can be applied when it stated as follows:

> It follows from the foregoing authorities that there are three elements woven into the fabric of the doctrine embodied in s 57. First, the event upon which the promisor relies as having frustrated the contract must have been one for which *no provision has been made in the contract*. If provision has been made then the parties must be taken to have allocated the risk between them. Second, *the event relied upon by the promisor must be one for which he or she is not responsible.* Put shortly, self induced frustration is ineffective. Third, *the event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract.* The court must find it practically unjust to enforce the original promise. If any of these elements are not present on the facts of a given case, then s 57 does not bite. (Emphasis added.)

[35] The ingredients to be satisfied before this doctrine can be applied in any contract are:

(a) no provision has been made in the contract;

(b) event relied upon by the promisor must be one which he is not responsible; and

(c) it would be unjust to enforce the original promise.

THE SUPERVENING EVENT

[36] The supervening event according to the defendant is the fact that despite the aggressive marketing that was taken by the defendant, the sales was poor. After all the hard work of aggressive campaigning both locally and internationally, there were only 49 buyers for the whole project. This was evident from the testimony of DW2, the general manager in properties marketing division of the defendant, who said in answer to question 10 of her witness statement in exh D3.

[37] DW2 in evidence said that:

> The defendant negotiated with all the 49 purchasers to rescind the sale and purchase agreement by explaining to them of the poor sales and the Project based on its original concept of development would fail. This would be evident from the poor

response from prospective purchasers despite the aggressive marketing. The defendant offered to refund the 10 % deposits which were paid. In addition and on a strictly without prejudice basis, the Defendant paid an ex-gratia compensation sum of up to 87 % of the 10 % deposit paid. 48 purchasers understood the reasons for the defendant to rescind the sale and agreed to rescind the sale after being informed that it would not be possible to proceed with the Berjaya Central Park project. The 48 purchasers understood that it was also in their best interest to accept the rescission of the sale and purchase agreement.

[38] It was also in evidence that the defendant had waited for two and half years before deciding to negotiate with the 49 buyers to rescind the respective SPAs.

[39] The fact of the poor sales was intimated to the first and the second plaintiffs as early as 2007. This is evident from the Letters dated 6 September 2007, 20 November 2007, 14 January 2008, 6 February 2008 and 20 February 2008 which were written to the first and the second plaintiffs to rescind the contract and to refund the deposit which both the plaintiffs have paid. In the letter dated 18 November 2008 (p 62 bundle B) the defendant had written to the first and the second plaintiffs after a meeting which was held on 20 February 2008. Paragraph 2 of the said letter states as follows:

Having repeatedly mentioned in our numerous correspondence with you in respect of the abovementioned property, we wish to reiterate that our proposal to a rescission of the Sale and Purchase Agreement (SPA) entered into between us is due to our company's decision to change entirely the concept and layout of he abovesaid project to meet the demands and trends currently in the Kuala Lumpur property market. The reason for us to make this decision was due to poor sales respond as the demand for the current concept is not favourable to the purchasers/investors in entirely. Due to the poor sales status we would definitely not be able to proceed with the project in its original concept and layout. We are currently advised to reposition the current development, and in view of material and radical change to the project, we will no longer be in a position to deliver the properties that you had purchased.

[40] Paragraph 3 of the same letter made reference to several other letters which were written by the defendant to the first and the second plaintiffs which had informed both the plaintiffs of the impossibility to perform the SPAs. Therefore the fact of the poor sales and the impossibility to perform the SPAs by the defendant is not something new to the first and the second plaintiffs. This fact was made known to them by the defendant as early as 2007. When the first and the second plaintiffs were informed of the same, there was no request from both of the plaintiffs for any document. In fact the letter from the first and the second plaintiffs' solicitors dated 26 November 2008 (p 63 bundle B) states that 'the unforeseen circumstances is not acceptable and not provided by the agreement' It was not expressly disputed by the first and the second plaintiff as

to the poor sales and response from buyers or that the defendant needed to reposition itself as far as the project is concerned.

[41] DW2 who was personally involved in the marketing of the project testified as to the negotiations with the 49 purchasers. PW1 admitted that DW2 met PW1 to negotiate on the rescission of the SPA. Therefore I have no reason to doubt the evidence of DW2 on the poor sales and the negotiations which was held with the 49 purchasers.

[42] In addition, the fact of poor sales was also established via a rational study report which was prepared by the firm of Knight Frank which is exhibited in D2. In gist the report states that if the project were to proceed on the original concept, the development of the project is doomed to fail due to poor sales and response from buyers. This is evident from paras 3.2.1 and 3.3 of D2. The report examined the various weaknesses of the original concept of development. To obtain good sales the defendant was advised to reposition itself on the concept of the development.

[43] The contents of D2 was never challenged by the first and the second plaintiffs. PW1 only raised the issue that he did not have personal knowledge that only 49 units of the service suites were sold. This aspect of the evidence from DW1 would support the fact that there was poor sales, the defendant could not proceed on the original concept and that the defendant needed to reposition itself on the concept of development to attract sales for the project.

[44] Therefore as far as the evidence of the poor sales and the effort taken by the defendant to promote the same has been established by the defendant.

FIRST ELEMENT: WHETHER THERE IS PROVISION IN THE CONTRACT BETWEEN THE FIRST AND THE SECOND PLAINTIFFS WITH THE DEFENDANT

[45] When the fact of the impossibility to perform by the defendant was conveyed to the first and the second plaintiffs as early as 2007, the reply by the first and the second plaintiffs' solicitors dated 26 November 2008 (p 63 bundle B) never made any request for clarification nor document save for an express statement that 'the unforeseen circumstances is not acceptable and not provided by the agreement'.

[46] Hence, this is an express admission on the part of the first and the second plaintiffs that there was indeed no issue as to the fact that the SPA between the first and the second plaintiffs and the defendant does not contain any provision on the supervening event/circumstances.

SECOND ELEMENT: WHETHER THE EVENT RELIED UPON BY THE DEFENDANT IS ONE WHICH THE DEFENDANT IS NOT RESPONSIBLE

[47] DW2 in her evidence said that there had been aggressive campaign by the defendant in the marketing of the project for two and half years both locally and internationally. Despite such efforts, only 49 units were sold which is about 2% of the total units.

[48] The report by Knight Frank in exh D2 shows that with the original concept of the project, it has not received the required response from buyers and it will remain to be so, unless the defendant change the concept so as to attract buyers. The report stated that the weaknesses of the original concept had been examined and it was strongly recommended that it be changed.

[49] Therefore it cannot be said that the reason for the poor sale was due to the defendant.

[50] I am minded of the fact that a contract which is difficult to perform does not mean that the contract is frustrated. This has been stated by the Federal Court in the case of *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chin & Anor* [2009] 6 MLJ 293 at p 303 at para 22:

> A contract does not become frustrated merely because it becomes difficult to perform. If a party has no money to pay his debt, it cannot be considered impossible to perform as it is not frustration. Neither can he plead frustration because the terms of the contract make it difficult to interprete. If it cannot be performed or becomes unlawful to perform, then the party who is to perform his part of the bargain can plead frustration. The doctrine of frustration is only a special case to discharge a contract by an impossibility of performance after the contract was entered into (see *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 (HL)). A contract is frustrated when subsequent to its formation, a change of circumstances renders the contract legally or physically impossible to be performed (see Visu Sinnadurai, *Law of Contract in Malaysia and Singapore: Cases and Commentary* (2nd Ed), 1987) at p 519).

[51] Applying the principle as enunciated by the Federal Court in the case cited above, to the facts in our present case, the fact that there was a poor sale to the project does not fall in the category of contract which is 'difficult to perform'. I would think that it is commercially impossible if not practical to proceed with the project when there is no buyer to the project despite the aggressive marketing both locally and internationally. I find support also in the Federal Court case of *Goh Yew Chew & Anor v Soh Kian Tee* [1970] 1 MLJ 138 at p 141 which adopted *Chitty on Contracts* (22nd Ed) which stated as follows:

> The doctrine of frustration is relevant when it is alleged that a change of circumstances after the formation of the contract renders it physically or commercially impossible to fulfill the contract. The doctrine is not concerned with initial impossibility which renders a contract void ab initio, as where a party to a contract undertakes to perform an act which, at the time the contract is made, is physically impossible according to existing scientific knowledge and achievement.

[52] Therefore the circumstances is not something which is foreseeable by the defendant when it launched the project. At the time when the project was launched the defendant never knew that with the original concept the sales response would be very bad.

IT WOULD BE UNJUST TO ENFORCE THE ORIGINAL PROMISE

[53] It was in evidence that the defendant managed only to make sales of 2.95 % ie only 49 units out of the 1658 units sold.

[54] From the report of Knight Frank in exh D2, it would not be viable for the project to proceed until 70–90 % sales are met. Since the project only had 2.95 % it certainly is not advisable to go on with the same.

[55] If the project is allowed to go on, it would not be fair to the defendant as commercially it is heading towards disaster. As far as the purchasers are concerned, surely they would not want to purchase a property where there are hardly any purchasers. It would not be conducive to stay in a building where there is hardly any residents. In addition, this would have effect on the value of the property for investment purposes. This was said by DW1 in his evidence that:

> looking at the purchasers' point of view, it would not be a good move. The Project slow sales in itself shows that demand for such units are limited and as an investment it would not have been a good investment for anyone of the purchasers.

[56] It does not make good business sense for one to buy such property knowing that it would not make a good investment of the property. The first and the second plaintiffs said that they bought the property for own use and not for investment purposes.

[57] However, it has been shown that the first and the second plaintiffs bought the units for investment purposes. This can be discerned from the document at p 54 of bundle B where it was stated that the first and the second plaintiffs bought the property for 'investment', despite PW1 denying filing in the column that stated the purpose of buying the units was for 'investment' purposes.

[58] It was also in evidence that the first and the second plaintiffs do not have any business in Malaysia and neither are they residing in Malaysia. The first and the second plaintiffs are residing in Singapore and the first plaintiff is working in China. Hence it cannot be disputed that the purchase of the units was for investment purposes.

[59] In cross-examination when PW1 was asked as to whether it was worthwhile to purchase the units for investment, PW answered 'I have no comment if I am buying it for investment purposes'.

[60] It is clear that PW1 is evading to answer a clear direct question when he is fully aware that to buy a property which does not attract good sales is certainly a bad investment.

[61] Therefore, it would be totally unjust to the defendant and also to the purchasers (ie the first and the second plaintiffs) if the original SPA is to be enforced when it is commercially impossible for the defendant to perform. There has been a radical change from the original circumstances when the original obligation was undertaken, which are:

(a) the original concept was not viable based on report in D2; and

(b) after aggressive marketing for two and half years locally and internationally, the sales received was poor.

[62] The change in the circumstances was never due to the fact that the obligations of the defendant became more onerous to perform. However the change in the circumstances was beyond the control of the defendant and it makes it commercially impossible to perform and it would be unjust on all parties if the SPAs are allowed to proceed on the original concept of development.

[63] Hence the contention by the first and the second plaintiffs that the defendant had breached the contract which renders the defence of frustration pursuant to s 57(2) of the Contracts Act 1950 unsustainable, is therefore untenable.

FAILURE OF THE DEFENDANT TO PRODUCE ALL THE 49 SPAS

[64] It is the contention of the plaintiffs' counsel that the defendant failed to show to the court all the 49 SPAs.

[65] On this issue first of all, there has not been any request by the first and

the second plaintiffs with regard to the 49 SPAs. There was no notice of produce served on the defendant or its solicitors.

[66] In any event there is no challenge that the defendant was only able to sell 2.95 % (49) units out of the whole units which were promoted. DW1 and DW2 through their evidences have established that there was poor sales and the first and the second plaintiffs have been notified of the same vide letter dated 18 November 2008. There was never any request from the plaintiffs for the production of the 49 SPAs then.

[67] Thefore from the above, it is without doubt that the SPA of the first and the second plaintiffs and the defendant is a frustrated contract and the remedy is provided in s 15(2) of the Civil Law Act 1956.

Remedy

[68] The defendant had refunded the deposit sum paid by the first and the second plaintiffs. The payment of refund by the defendant were accepted by the first and the second plaintiffs without reservation. There is no further remedy available to the first and the second plaintiffs.

[69] Even assuming for a moment that the contract is not frustrated, (which in this case I have determined that it is so), and that the defendant is in breach, the first and the second plaintiffs have failed to prove any losses which they have allegedly suffered. The first and the second plaintiffs are claiming for:

(a) whatever purchase price paid by the first and the second plaintiffs to the defendant to the amount of RM44,650;

(b) the legal fees to the amount of RM10,792.32; and

(c) general damages to the amount of RM463,000.

[70] It is to be noted that the first and the second plaintiffs are claiming for LAD although it is not pleaded. This can be seen from the answer to question 5 in PW1's witness statement. However, special damages has not been pleaded by the plaintiffs in the pleadings. Failure to do so is fatal. In any event the SPA had been terminated by the defendant via letter dated 19 March 2009. LAD is relevant when the SPA is subsisting. Upon termination the plaintiffs are only entitled to claim for damages and not LAD.

[71] As for the claim of general damages of RM463,000 the plaintiffs have failed to substantiate such claim.

[72] The evidence of the first and the second plaintiffs is that in a letter dated

26 November 2008 (p 63 bundle B) the first and the second plaintiffs' solicitor had alleged that the first and the second plaintiffs were informed by real estate agents that the property prices in the locality is high. In a subsequent letter dated 19 March 2009 (p 68 bundle B) the first and the second plaintiffs are claiming the amount of RM463,000 from the defendant.

[73] The defendant had requested for support or basis for the claim by the first and the second plaintiffs vide letter dated 24 April 2009 (pp 1–2 bundle C), however there was no valuation report or basis provided by the first and the second plaintiffs. In fact the basis of the claim was told by PW1 as follows:

> I have not prepared any valuation report to support my claim of RM 463 000.00 because I am basing on my buying price. Since they want to take back my unit so no seller will want to sell it below their buying price. I do not have a valuation report prepared because I am basing on my purchase price.

[74] In the absence of any other valuation report on the part of the first and the second plaintiffs, clearly the statement made by PW1 cannot be a basis for the claim. In sharp contrast is the report by the defendant in exh D2 and the evidence of DW1 which essentially points to the fact that the project cannot attract buyers and it would be a disaster to proceed further. This evidence has not been rebutted nor challenged by the first and the second plaintiffs.

[75] It is possible to calculate general damages but there must be evidence to assist the court in calculating it. Special damages, on the other hand, must be claimed specially and proved strictly. Of course, general damages are such that the law will presume to be the direct, probable or natural consequence of the action complained of but evidence must be led to assist the court in computing the quantum. One cannot throw general damages, or special damages at the feet of the court and expect the court to award the amount. One has to to prove it by leading evidence (*Prehn and another v The Royal Bank of Liverpool* (1869) LR 5 Exch 92.

[76] As for the claim of legal fees, since the contract was frustrated the claim for legal fees cannot be entertained.

[77] As for the claim for exemplary damages, there is no evidence led by the plaintiffs. The main purpose of exemplary damages is to punish and according to Lord Devlin in *Rookes v Barnard and others* [1964] AC 1129 at pp 1227–1228, three conditions must be fulfilled:

(a) that a claimant cannot recover exemplary damages unless he or she is the victim of punishable behaviour;

(b) that the awards of exemplary damages should be moderate; and

(c) the financial means of the parties.

[78] The conduct of the parties has to be taken into account and it remains a relevant consideration in assessing exemplary damages (*Praed v Graham* (1890) 24 QBD 53). There is no evidence led at all on the above three ingredients above. There is nothing to show that the plaintiffs are a victim of some punishable behavior on the part of the defendant. Why should the defendant be punished for some event (ie the project doomed to fail as it failed to attract buyers) which is beyond their power or control.

CONCLUSION

[79]

(a) The defendant has established that the SPA was rescinded due to poor sales which is an unforeseen and supervening events. This was not provided for in the contract;

(b) despite aggressive marketing both national and internationally.there were poor sales, and this is beyond the control of the defendant. The SPA had become physically and commercially impossible to perform due to the change in circumstances;

(c) therefore the SPA prima facie was dissolved by frustration;

(d) the SPA was lawfully rescinded by the defendant; and

(e) it would be unjust to enforce the original promise.

[80] Therefore based on the above the claim by the plaintiffs is dismissed with costs.

Claim dismissed with costs.

Reported by Ashok Kumar